



## I-9 COMPLIANCE 101

What is an I-9, and why do you have to have this?

The "I-9" is what people use to describe the Employment Eligibility Verification Form I-9 and is one of the tools used by the government to try to ensure that employers are hiring only legal citizens or residents, and those individuals eligible to work in the United States.

The 1986 Immigration Reform and Control Act ("IRCA") was supposed to help control illegal immigration by ensuring that unauthorized persons would not be able to get a job in the United States. IRCA's main focus is to prohibit the hiring or continued employment of aliens who employers know or should know are not authorized to work in the United States. Thus, IRCA requires all U.S. employers to complete the I-9 for all employees hired after November 6, 1986. Employers do not need to have I-9s completed for independent contractors or for workers provided to them by a staffing company.

*When I-9 obligations are triggered.*

The I-9 form has three sections:

- Section 1 – Employee Information and Verification;
- Section 2 – Employer Review and Verification; and,
- Section 3 – Updating and Reverification.

Section 1 must be completed by an employee on his or her date of hire, the first day of paid work. This section identifies the employee's personal information such as name and address, and whether the individual is a U.S. citizen, lawful permanent resident, or an alien authorized to work in the U.S. for a specific period.

Section 2 must be completed by the employer within three business days from the time the employee begins employment.

Section 3 must be filled out if an employee's employment authorization is temporary and will expire. This section must be filled out on or before the expiration date of the employee's employment eligibility. This section is also used for employees who separate and return to work within three years from the date the I-9 was initially completed, provided the employee's documentation presented for Section 2 is still valid.

*What the employer's obligations are.*

First, with respect to Section 1, you must ensure that the employee has completed the entire section. If not, you should not hire him or her. You cannot, however, require employees to produce documents to verify Section 1 information. Also, you cannot require the employee to include his or her social security number in this section unless you participate in the voluntary automated eligibility confirmation program, E-verify.



With respect to Section 2, the employer must review and record documents that identify the employee's identity and employment eligibility. An employee may choose to provide a document from List A (which establishes both identity and work eligibility) or one document from List B (which establishes identity) AND one from List C (which establishes work eligibility). The employers cannot specify which documents an employee produces and should not "over document" by recording information for List A or B and C documents.

As discussed above, an employee must supply these documents within three days after he or she begins employment. The only exception to this rule is if the employee presents a receipt for application for a new document that has been lost, stolen, or damaged. Then, the employee must submit the document within 90 days from the date of hire. A receipt showing the employee applied for a document for the first time is **not** acceptable.

Employers must review and accept documents that reasonably appear to be genuine and relate to the person presenting them. Thus, it is important for your representative to know what to look for and what should raise a red flag, such as a social security number starting with 999, or if the social security card states that it is only valid with DHS authorization, your representative must ask to see the authorization document.

With respect to Section 3, employers must reverify employment eligibility when an employee's employment authorization as indicated in Section 1 expires, or if the evidence of employment authorization as recorded in Section 2 has expired. To reverify an expired status, the employee may give you any valid document from List A or C of the I-9. The employee does not need to give you an updated version of the expired document.

Finally, once the I-9 is complete, you must keep it for each employee for three years after the date of hire or for one year after employment is terminated, **whichever is later**. Thus, an employer will always have I-9s for current employees.

#### *Why comply?*

It's the law, and failure to comply carries civil and criminal penalties, as well as potential public relations nightmares. Specifically, if you fail to complete or retain I-9s, civil fines range from \$110-\$1,100 per violation (i.e, for each time an I-9 should have been completed, retained, etc.). Also, if you are found to have knowingly hired or continued to employ unauthorized aliens, you face exposure to: (1) fines ranging from \$375 to \$3,200 per unauthorized worker for a first offense, from \$3,200 to \$6,500 for second offenses, and from \$4,300 to \$16,000 per unauthorized worker for subsequent offenses; (2) criminal penalties in the form of up to six months' imprisonment and/or fines up to \$3,000 per each unauthorized alien hired or employed; and (3) denial of federal contracts. These are just the federal penalties. Many states also have or are considering their own laws and penalties regarding hiring unauthorized workers.

#### *Avoid The Costly Errors.*

When is the last time your company audited its I-9 practices? If the answer is more than a year or two ago or you can't remember whether or if this has been done, now is the time to act. Open up the newspaper, and you're likely to see a company cited for failing to comply with I-9 requirements or a subcontractor indicted for aiding illegal immigrants. With the Department of Homeland Security ("DHS") turning its eyes to catching employers out of compliance, the odds of



getting audited are increasing exponentially. With the help of your counsel, you should review your current practices to make sure:

1. all of your company's individuals involved in the I-9 process are thoroughly trained with respect to I-9 requirements;
2. you have a "tickler" system in place to capture expiration dates of certain work authorization documents, taking into account time for you or the employee to apply for extensions, if necessary, and a system for reverifying the documents, as well as to alert you when I-9s can be discarded;
3. your contracts with temp agencies or subcontractors contain provisions in which they confirm that they are in compliance with all immigration laws, they agree to provide you with any such documentation upon reasonable notice, and they agree to indemnify you for any damages incurred by their failure to comply with IRCA;
4. the people you are classifying as "independent contractors" are not really "employees" for whom you should be completing I-9s;
5. you're not committing some common errors, such as: (a) failure to retain I-9s for the proper length of time and/or retaining I-9s that could have been discarded (note, ICE does issue fines for technical violations even on I-9s that companies could have discarded); (b) failure to obtain the necessary documentation for Section 2 and/or over-documentation; (c) failure to ensure that the employee presents documentation consistent with what the employee said his/her status was. In other words, the employee says she is a permanent resident, but then the company accepts a work authorization as a document (which could not be consistent with her status); (d) failure to complete Section 2 timely (within three days from start of employment); (e) failure to sign and/or date signatures, which can give the impression that the form or certain sections were not completed timely if uncorrected; and (f) failure to re-verify documents when necessary; and
6. you're not forgetting about IRCA's other main goal—to prevent discrimination. IRCA also prohibits employers from discriminating against any person (other than an unauthorized alien) in hiring, firing, recruiting, paying, etc. due to a person's national origin or citizen status. The Form I-9 process cannot be used to pre-screen employees for hiring. Additionally, an employer cannot choose which documents an employee uses to satisfy I-9 requirements.

—[Laurie M. Chess](#) and [Mary Ellen B. Jordan](#)



*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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